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devolution of the convict's property to his heirs.[13] Most of the jurisdictions where the principle of *civiliter mortuus* is applied, provide, therefore, by statute, for the administration of the felon's estate and the safeguarding of his interests by trustees.[14] The recent case of *Byers* v. *Sun Savings Bank* (Okla. 1914) 139 Pac. 948, arose, however, under an act which suspended all civil rights of a person sentenced to a term in the penitentiary, but failed to provide for the appointment of trustees to administer his estate; it was held that the felon had power, while under confinement, to make contracts enforcible against his estate and dispose of his property for the purpose of employing counsel. This decision, which was based on the ground that a total divesting of the convict's capacity to contract and to convey his property would nullify the inherent right to sue for a writ of habeas corpus, or to petition for a pardon or parole, seems just and in consonance with the reason of the law.[15] It follows, moreover, the trend of modern judicial opinion, which is inclined to allow a convict to retain all his civil rights save those taken from him expressly or by necessary implication of law.[16]

PRIVILEGE IN PUBLICATION OF PLEADINGS.—Since all criminal and most civil actions involve some detriment to reputation, it is important to note the degree to which courts will protect newspaper accounts of judicial proceedings. The doctrine of privilege, formerly based by some upon the narrow principle that since courts were open to all, there could be no harm in reporting their proceedings to all,[1] really rests upon the proposition that upon many occasions the private rights of individuals must be subordinated to paramount needs of society.[2] Accordingly, when statements and documents before a legal tribunal are properly pertinent to the issue, subjection of their authors to civil responsibility would tend to impair the freedom of the inquiry and the administration of justice, and should not be permitted.[3] It cannot be said, however, that the same reason applies to news reports of such proceedings, and only when publication is of benefit to the public is it protected.[4] To the extent, therefore, that the impartial administration of justice is of vital interest to the public, and publicity is security for

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[13]Smith *v.* Becker (1910) 62 Kan. 541; Davis *v.* Laning (1892) 85 Tex. 39; *cf.* Frazer *v.* Fulcher (1848) 17 Ohio 260. It has been held, moreover, that the contingency of death without children, upon which a gift over was limited, is not satisfied by the civil death of the primary devisee. Avery *v.* Everett (1888) 110 N. Y. 317.

[14]See Trust Co. of America *v.* State Safe Deposit Co. (1905) 109 App. Div. 665; New *v.* Smith, *supra.*

[15]See Stephani *v.* Lent (N. Y. 1900) 30 Misc. 346.

[16]See 5 Columbia Law Rev. 468, 469; Westbrook *v.* State (1909) 133 Ga. 578, 585; St. Louis, etc. Ry. *v.* Hydrick (Ark. 1913) 160 S. W. 196.

[1]MacDougall *v.* Knight & Son (1886) 17 Q. B. Div. 636; see Stockdale *v.* Hansard (1837) 9 A. & E. 1, 212.

[2]Rex *v.* Wright (1799) 8 D. & E. 293; 1 Cooley, Torts (3rd ed.) 451, *et seq.*

[3]Odgers, Slander & Libel (5th ed.) 233.

[4]See Metcalf *v.* Times Publishing Co. (1898) 20 R. I. 674.

judicial responsibility, are the matters published of public concern and so entitled to privilege.[5]

Unless the judicial proceedings involve some prayer for relief which has been brought to the attention of the court,[6] and are such as must result in a final determination,[7] the necessary element of common interest is lacking, and the publication cannot be justified. But the public is concerned with the proper conduct of a hearing before a magistrate, and privilege has been extended almost universally to reports of preliminary proceedings and *ex parte* applications,[8] as well as to motions made in chambers,[9] although they were subsequently dismissed or the court was without jurisdiction.[10] Mere pleadings, however, before brought to the attention of a court, are not technically judicial proceedings.[11] They are addressed to the court and not the public, and it is quite possible that they may be scurrilous or that they may be withdrawn at any time. They may also fail of proof on trial, or, if made public before adjudication, serve to poison the public mind. Influenced by these possibilities, most courts have declared the balance of convenience to be in favor of the individual, and have declined to protect publication.[12] The recent case of *Lundin* v. *Post Publishing Co.* (Mass. 1914) 104 N. E. 480, in which privilege was denied to the publication of a pleading which, although filed, had not yet received judicial notice, is in illustration of the general rule.

While it is true that the existence of an adequate remedy against the author of opprobrious pleadings is no bar to a suit against the publisher, and that the withdrawal of charges cannot undo the harm done by their publication,[13] other reasons for denying the privilege are not so well founded. Failure of proof, for example, can be discovered only in the course of a judicial hearing, a fair report of which may be published with immunity,[14] and, in theory, at least, public opinion is never formed until after a trial of the issue.[15] At early common law, moreover, all pleadings were required to be made orally before the court,[16] until as a result of increased litigation, convenience

[5]Wason *v.* Walter (1868) L. R. 4 Q. B. 73.

[6]Cowley *v.* Pulsifer (1884) 137 Mass. 392; see Parsons *v.* Age Herald Publishing Co. (Ala. 1913) 61 So. 345.

[7]Kimber *v.* Press Assn. (1892) 62 L. J. Q. B. 152.

[8]Pinero *v.* Westlake (1867) 15 L. T. N. S. 676. The same is true of applications for a change of venue, Merriwether *v.* Knapp & Co. (1908) 211 Mo. 199, or for an injunction, see American Publishing Co. *v.* Gamble (Tenn. 1906) 90 S. W. 1005, or to make affidavit before a magistrate. Beiser *v.* Scripps-McRae Publishing Co. (1902) 113 Ky. 383.

[9]Metcalf *v.* Times Publishing Co., *supra;* see Blodgett *v.* Des Moines Daily News Co. (Ia. 1907) 113 N. W. 821; *cf.* Todd *v.* Every Evening Printing Co. (Del. 1906) 6 Pennewill 233.

[10]Lee *v.* Brooklyn Union Publishing Co. (1913) 209 N. Y. 245; Usill *v.* Hales (1878) 47 L. J. C. P. 323.

[11]Ilsley *v.* Sentinal Co. (1907) 133 Wis. 20.

[12]See note to case of Byers *v.* Meridan Printing Co. (Ohio 1911) 38 L. R. A. [N. S.] 913; note to case of Nixon *v.* Dispatch Printing Co. (Minn. 1907) 12 L. R. A. [N. S.] 188.

[13]See Park *v.* Detroit Free Press Co. (1888) 72 Mich. 560.

[14]See notes 8, 9, and 10, *supra.*

[15]See Lewis *v.* Levy (1858) El., Bl. & El. 537.

[16]3 Bl., Comm. *293 *et seq.;* 2 Pollock & Maitland, History of English Law, 602 *et seq.*

made it necessary that they be filed with some lesser official. It must be admitted, however, that the present rule, if applied in the period to which its origin is attempted to be traced, would not necessarily have led to a different result, since oral pleadings must certainly have received judicial notice.[17] Even now, in some jurisdictions, filed pleadings have been considered to partake so much of the character of public records, that a report of the charge upon which an arrest has been made, when unaccompanied by comment, has been held privileged.[18] Flexibility is of the essence of the rule,[19] and it is not inconceivable that the same considerations of policy now construed to prohibit a privileged publication of pleadings, may at some future time be invoked in its behalf.

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[17] *Cf.* Gazette Printing Co. *v.* Shallow (1908) 41 Can. Sup. Ct. 339, 344.

[18] See Commercial Publishing Co. *v.* Smith (C. C. A. 1907) 149 Fed. 704; *contra,* Meeker *v.* Post Printing etc. Co. (1913) 55 Colo. 355; *cf.* Parker *v.* Republican Co. (1902) 181 Mass. 392. Absolute privilege may, of course, be prescribed by statute. See A. H. Belo & Co. *v.* Lacey (Tex. 1908) 111 S. W. 215.

[19] See opinion of Coleridge, J., in Usill *v.* Hales, *supra.*